IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

WEDNESDAY, THE 11TH JULY 2007 / 20TH ASHADHA 1929

CRP.No. 1949 of 2003(B)

AGAINST THE ORDER DATED 23/08/2003 IN EP.8/2003 IN OS.364/2001 of MUNSIFF COURT, CHANGANACHERRY

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REVN. PETITIONERS: JUDGMENT DEBTORS 1 AND 3.

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1. GEORGE MATHEW, PUTHENPURAYIL, CHEERAMCHIRAKARA, CHETHIPUZHA VILLAGE.

2. JOSSY P.M. PULIMOTTIL, PERUNNA P.O. CHANGANACHERRY VILLAGE.

BY ADV. SRI.JOHN VARGHESE
SRI.T.SAJI

RESPONDENT: DECREE HOLDER.

GRACY GEORGE, PARYATHETTU HOUSE, PADINJATTUMCHERIMURIYIL, KAVIYOOR VILLAGE, MANAGING PARTNER, PARYATHETTU CHITY FUND, REP. BY HER POWER OF ATTORNEY HOLDER, VARGHESE GEORGE, DO. DO. DO.

BY ADV. SRI.V.GIRI

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 11/07/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A.NO.2156 OF 2003 IN C.R.P.NO.1949 OF 2003

DISMISSED

11.7.2007 SD/- PIUS C.KURIAKOSE, JUDGE.

PIUS C. KURIAKOSE, J.

C.R.P. No. 1949 OF 2003

Dated this the 11th day of July, 2007

O R D E R

This Civil Revision Petition is directed against the order of the execution court in a proceeding for execution of a money decree finding that the petitioners are liable to be arrested and detained in civil prison on the reason that in spite of sufficient means, they have willfully neglected to make the payment. Notice under Rule 37 of Order 21 CPC was issued to the petitioners and in response the petitioners contended that they have no means to pay the decree debt and that they are not liable to be arrested and detained in civil prison. The question of the petitioners' liability for arrest and detention was enquired into by the execution court and the evidence consisted solely of the oral testimonies of the decree holder's husband as PW1 and that of the second judgment debtor as DW1. Thus there was absolutely no counter evidence to the decree holder's evidence regarding the liability of the petitioners who were judgment debtors 1 & 3 for arrest. The court would accept the decree holder's evidence and hold that the petitioners are liable to be arrested and detained. As regards the second judgment debtor in the case who is not a party to this Civil Revision Petition, the prayer for arrest was declined.

2. I have heard the submissions of Sri.John Varghese, learned counsel for the petitioners and also those of Sri.V.Giri, learned counsel for the respondent decree holder. Mr.John Varghese would submit that in terms of Sub-rule (1) of Rule 40 of Order XXI CPC as well as Section 51 of the same Code, it is obligatory on the part of the execution court to afford a further opportunity to the judgment debtor to show cause against his detention in civil prison after the court has entered a finding that the judgment debtor has sufficient means and has willfully neglected to pay the decree debt. Mr.John Varghese would rely on the judgment of the Supreme Court in **Jolly George Varghese v. The Bank of Cochin** [(1980) 2 SCC 360] and argue that an order of arrest which affects the liberty of a citizen is not to be issued lightly. Such an order can be passed only on the basis of objective satisfaction of the Court on cogent evidence that the judgment debtor has neglected to pay the decree debt in spite of sufficient means. A further opportunity should be given to the judgment debtor for showing cause against detention in civil prison.

Sub-rule (1) of Rule 40 of Order XXI CPC highlighted before me by Mr.John Varghese is quoted below:

> "40 : **Proceedings on appearance of Judgment Debtor in obedience to notice or after arrest**:- (1) When a judgment-debtor appears before the Court in obedience to a notice issued

under Rule 37 or is brought before the Court after being arrested in execution of a decree for the payment of money, the Court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution, and shall then give the judgment debtor an opportunity of showing cause why he should not be committed to the civil prison."

"Sub-rule (3) is also relevant and the same is as follows:

(3) Upon the conclusion of the inquiry under Sub-rule (1), the Court may, subject to the provisions of Section 51 and to the other provisions of this Code, make an order for the detention of the judgment-debtor in the civil prison and shall in that event cause him to be arrested if he is not already under arrest:

Provided that in order to give the judgment debtor an opportunity of satisfying the decree, the court may, before making the order of detention, leave the judgment debtor in the custody of an officer of the court for a specified period not exceeding 15 days or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied."

Section 51 which is referred to in Sub-rule (3) of Rule 40 and relied on by Sri.John Varghese provides as follows:

"**Section 51** : - (only the relevant portions) **Powers of court to enforce executio**n:- Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree holder, order execution of the decree-

(c) by arrest and detention in prison for such period not exceeding the period specified in Section 58, where arrest and detention is

permissible under that Section;

Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment debtor an opportunity of showing cause why he should not be committed to prison, the court for reasons recorded in writing, is satisfied-

(a) that the judgment debtor, with the object or effect of obstructing or delaying the execution of the decree,-

(i) is likely to abscond or leave the local limits of the jurisdiction of the court, or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or

(b) that the judgment debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgment debtor was bound in a fiduciary capacity to account."

3. A conjoint reading of Rules 37 and 40 of Order XXI and Section 51 will show that the Code envisages only one inquiry regarding the judgment debtor's liability for detention in civil prison in execution of a money decree. The inquiry can be either when objections are filed by the judgment debtor in response to a show cause notice against arrest issued to him under Rule 37 or when he is arrested and brought before

court before holding any inquiry regarding his liability for arrest. The inquiry referred to in Sub-rule (3) of Rule 40 of Order XXI is that inquiry. It is such an inquiry which has been conducted in this case against the petitioners. The words "the court shall proceed to hear the decree holder" appearing in Sub-rule (1) of Rule 40 only refer to the initial hearing regarding necessity of holding an inquiry and it is pursuant to such a hearing that the decree holder adduced evidence in this case. The permission granted by the execution court to the judgment debtors for adducing counter evidence actually amounts to "opportunity for showing cause" against arrest. Sub-rule (3) of Rule 40 makes the position free of all doubts and it is clear that the execution court is not under any obligation to grant a further opportunity to a judgment debtor to show cause against arrest once an inquiry under Rule 40 in response to arrest notice under Rule 37 has been completed with the participation of the judgment debtor.

4. It is difficult to accept the further argument of Mr.John Varghese that the evidence adduced by the decree holder falls short of holding that the petitioners have sufficient means to pay the decree debt and that they have willfully neglected to pay. The evidence of PW1 is to the effect that the petitioners have wholesale business in foot wears and that they earn Rs.7,000/- per mensem. As already indicated, to the

adduced evidence, absolutely no counter evidence was adduced by the petitioners. I do not find any infirmity and much less jurisdictional infirmity tainting the impugned order, justifying invocation of revisional jurisdiction. It is clear that the learned Munsiff has kept in mind the ratio of the judgment of this Court in **Kuppuswamy v. P.G. Menon** (1992 (2) KLT 203) which was binding on him while passing the impugned order.

Even as I turn down both the arguments advanced by Mr.John Varghese, on considerations of indulgence, I am inclined to grant instalment facility to the petitioners in the matter of payment of the decree debt. The petitioners together will pay a sum of Rs.1,000/- towards the decree debt either directly or through the decree holder's counsel in the court below commencing from 01.09.2007. In the event of their committing any two defaults in the matter of paying of instalments, the impugned order will become operative forthwith and the execution court can straight away issue warrant for arrest and detention of the petitioners.

PIUS C. KURIAKOSE, JUDGE

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